United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR PETITIONERS

1976

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,988

THOMAS E. PAYNE, Individually and Representing the METROPOLITAN CITIZENS ADVISORY COUNCIL

MARION BARRY, JR., LAWRENCE AARONSON, SAMMIE ABBOTT, MRS. LILLIAN GREEN, RALPH (PETIE) GREEN, MRS. WILLIE HARDY, MRS. DOROTHY HARRISON, LESTER MCKINNIE, MRS. ROBERT NASH, BERNARD W. PRYOR, MRS. MARY RAY, MRS. MARIA WORRIS, MRS. PHILLIP YOUNG,

LONNIE KING, Individually and Representing the YOUNG DEMOCRATS OF THE DISTRICT OF COLUMBIA, *Petitioners*,

v.

THE WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, 1815 Fort Myer Drive, Arlington, Virginia, *Respondent*.

Petition for Review of Washington Metropolitan Area Transit Commission Order No. 684

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QUESTIONS PRESENTED

1. In fixing a fair return, did the Commission make adequate inquiry into relevant data and accord sufficient weight to important economic factors?

2. In designing the rate structure, did the Commission make adequate inquiry into relevant facts and give sufficient weight and attention to factors which tended to indicate that the fare structure was unfair and discriminatory against the more densely populated areas of the Metropolitan District?

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BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

The jurisdiction of the Court is invoked pursuant to Article XII, Sections 16 and 17 of the Washington Metropolitan Area Transit Regulation Compact, 74 Stat. 1031

(1960), D. C. Code 1961, § 1410, et seq., hereafter referred to as the Compact.

Petitioners are residents of the District of Columbia and Maryland, and they and the groups they represent are regular riders of buses operated by the D. C. Transit System, Inc., in said District, and they, and persons similarly situated, are affected and aggrieved by Order No. 684, entered March 13, 1967, by the Washington Metropolitan Area Transit Commission (hereafter referred to as the Commission), increasing bus fares in the District of Columbia.

Petitioners, pursuant to § 16 of the Compact, supra, filed with the Commission an application in writing requesting reconsideration of its Order No. 684 and stating specifically the errors claimed as grounds for such reconsideration. The said motion for reconsideration was denied on April 12, 1967, by Commission Order No. 691.

On May 10, 1967 petitioners filed a petition for review of Order No. 684 with this court.

STATEMENT OF THE CASE

October 17, 1966 D. C. Transit filed an application with the Commission seeking authority for a new and substantially higher rate structure.

The new tariffs proposed by Transit raised the price of tokens from 4 for 85 cents to 4 for $1. They added a 5-cent transfer charge, and generally increased zone and express rates both within and without the District. Fares in some outermost Maryland zones were actually reduced, however.

The Commission directed a public hearing and suspended Transit's proposed new tariffs until February 13, 1967. Following a series of hearings, the Commission published its Order No. 656 on January 12, 1967 in which it directed the immediate implementation of a new and in-

creased fare structure on a temporary basis pending further inquiry into a fair rate of return.

The fare structure approved in "interim" order No. 656 was substantially different from that proposed by Transit. The token price was set at 4 for 95 cents, the transfer charge was eliminated, and the requests for increased fares for Suburban operations were generally scaled down.

Order 656 was stayed by this court and is under review here in No. 20714.

After further hearings, the Commission entered its final Order No. 684 here under review. The rate structure it approves is essentially the same as interim Order 656 except that tokns are set at 4 for 98 cents instead of 4 for 95 cents as in Order 656.

Other facts of the case are sufficiently delineated by the Commission in its respective orders and the arguments here to be presented.

STATEMENT OF POINTS

The grounds upon which petitioners seek relief are detailed in their petition to the Commission for Reconsideration of Order No. 684 and previous motions incorporated by reference therein. For the sake of brevity, those grounds may be conveniently considered under the following headings:

1. In fixing a fair return, the Commission failed to make adequate inquiry into relevant data, and failed to accord sufficient weight to important economic factors.

2. In designing the rate structure, the Commission failed to make adequate inquiry into relevant facts and failed to give sufficient attention and weight to factors which tended to indicate that the fare structure was unfair and discriminatory.

SUMMARY OF ARGUMENT

The Commission has not yet completed the broad inquiry into rate of return called for by this court in *D.C.* v. *WMATC*, 121 U.S. App. D.C. 375, 359 F. 2d 753 (1965). The record is little better in this regard now than it was when the Commission frankly confessed its inadequacy in entering interim order 656. The only addition to the record is expert testimony applying a single narrow economic theory of "Alternative Use Value." This is only one of many possible rate of return theories. Its principal advantage—giving effect to present market values of fixed assets—is also its principal disadvantage for, by so doing, rates increase automatically with land appreciation, an admittedly undesirable result. Since the expert steadfastly refused to extend his analysis beyond the horizons of this sectarian viewpoint, the broad analysis called for by the Court is still incomplete.

The record now is even scantier than before since the narrow limits of the expert's theories have been fully exposed. Indeed the testimony of the expert has raised far more questions than it has answered.

Rate Structure

Because there are no comparative analyses of costs and earnings by route, it is impossible to set a rate structure which is non-discriminatory. While net earnings may not be the sole basis for setting fares, to set fares without taking this factor into consideration at all is clearly wrong.[1] Moreover, it would seem that this wrong falls heaviest on the poor of this city. They live generally in the most densely populated parts of the city. Bus operations in these areas are the most profitable because (a) buses are loaded

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[1] Cf. *City of Detroit* v. *FPC*, 97 U.S. App. D.C. 260, 230 F. 2d 810, 818-19, and *Willmut Gas and Oil Company* v. *FPC*, 112 U.S. App. D.C. 27, 299 F. 2d 111, illustrating that, while not controlling, a cost analysis is a required point of departure in rate making.

more fully, (b) they are more likely to be used in off-peak hours, and (c) the equipment used is older and cheaper. There is circumstantial evidence for these conclusions in the comparisons between D.C. and Maryland operations.

	Md.	D.C.
Revenue per mile	.70	1.07
Operating expense per mile	.83	.91
Net profit or loss (before depreciation and capital expense)	(.13) loss	.16 profit

From this, it would appear that District of Columbia operations are subsidizing the Maryland operation. If, as it seems, the more densely populated areas are the most profitable, we are led to the further conclusion that the poor are subsidizing the rich!

If, as the Commission claims, such a conclusion is "speculative" on the present record, it in effect concedes legal error in failing to insure adequacy of the record in this regard:

> "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

This and the many other quotes and citations on this point collected in *Scenic Hudson* v. *FPC*, 354 F. 2d 608, 620 et seq. (CA 2), illustrate the affirmative duty on the Commission to inquire when reasonable questions are raised as they were in this case. Significantly reduced fares are plainly called for in certain sections of our city. Where and how much cannot be now determined. The Commission should undertake such a study before setting any new rates.

ARGUMENT

I. FAIR RETURN

Why is Transit permitted to earn, consistently, year after year more than a 100 percent annual return on its original $500,000 investment? Where in the record of these hearings are the answers to the Citizens Council memorandum to the Board of Commissions of December 16, 1966:

> We have recorded above . . . the amazing procedure by which D.C. Transit bought Capital Transit with only $500,000. The rest of the purchase price consisted of mortgages on the assets being purchased, namely the cash, the personalty and the realty . . . We admire such financial skill.
>
> We have also recorded above . . . D.C. Transit's financial manipulations and success in paying off the entire purchase debt and interest in three years, four and a half months—all of it coming out of cash flow from operating revenues, perhaps with an assist from the sale of the Fourth Street car barns. . . .
>
> Payment of the debt from revenue made crystal clear the fact that the bus riders paid for the company, except for the original $500,000, and that the stockholder's total investment and total financial interest was that same $500,000. The Congressional franchise provision for "such return as to make the Corporation an attractive investment" [Compact, § 6(a)(4)] thus has to refer to the return on the only investment made by the stockholder, namely $500,000. . . .
>
> . . . Considering that the operation is dedicated to the public welfare, and is a government protected monopoly with many tax exemptions, a 6½ percent return on the original investment seems quite adequate. This makes $12,153.74 for the 4½ months in 1956 and $32,500.00 per year thereafter. . . .
>
> [But] the above pages . . . show dividend payments of $290,000 for the year ending December 1957 and $400,000 for that ending December 1958. Broken down on the above rate of return, this $690,000 equals $77,153.74 for the 6½ percent return on investment, $500,000 for the return or reimbursement of the capi-

tal investment and $112,846 bonus. In this manner, the fare-paying bus riders paid off the investing stockholder in full by the end of 1958.

The payment of the $450,000 in dividends in the year ending December 1959 is thus inexplicable. If we assume that the previous payments to stockholders were not to return the investment but were entirely dividends, the rates would be 58 percent, 80 percent and now 90 percent in 1959. Commencing in 1960, the so-called dividends rose to $500,000 or 100 percent—a complete return of the investment each year. This is far in excess of the Congressional provision for "an attractive investment."

The WMATC has continued its approval of the 100 percent dividend rate, plus the accumulation of $3,385,405 in retained earnings or undistributed profits, despite the clear provisions in the compact for setting rates "at the lowest cost consistent with the furnishing of such service" and the "need of revenues sufficient to enable such carriers, under honest, economical and efficient management, to provide such service." [Compact § 6(a)(3)] Dividends of 100 percent seem to us to be a clear and flagrant violation of such provisions.

Extravagant dividends explained

The payment of large cash dividends in the face of claimed operating losses points to the highly theoretical character of such claims.

a. How much of the alleged "loss," for example, is made up for by an excessive depreciation allowance. The Citizen's report points out:

We are aware of the flexibility of depreciation set-asides. High depreciation transfers add to operating costs and thus reduce the apparent amount and ratio of the operating profits. Yet the depreciation is cash and used by the company for debt retirement, interest, genuine reserves or distribution to stockholders, as it wishes.

The Commission reduced the depreciable life of Transit's buses from 17 to 14 years in Order No. 245 and from 14 years to 12 years in Order No. 362. The stated reason for the shorter depreciation period was to encourage Transit to acquire new buses. If so, how much of the increased depreciation allowance represents a return on investment? How much of the deduction for depreciation is in fact profit on operations? There is no such analytic breakdown in this record. The failure to make such a distinction poisons all rate of return and other calculations which include any reference to depreciation.

b. The same type of inquiry is required with respect to all other reserve accounts, for, to the extent that such deductions are overstated they result in a hidden profit to the company. Conversely, the underapplication of the Acquisition Adjustment Account results in increased hidden profits as well. Yet there has been no meaningful inquiry into these distinctions. The record is thus misleading, and calculations which depend on such figures are necessarily tainted.

Other aspects of this matter are presently under consideration by this court in *Williams and Trask* v. *WMATC*, No. 20,200 and *Democratic Central Committee* v. *WMATC*, No. 20,201, and while raised again in these proceedings, will not be discussed here.[2]

Land operations

There had been no meaningful inquiry into land operations. Profits, past and future, for such operations are critical to a realistic evaluation of rate of return. Yet the record provides little enlightment. Where, for example, are the answers to these charges in the Citizen's report:

> The disappearance of real estate no longer used for operations into subsidiary corporations looks like a

[2] Exhibit R-13 shows the 1963 Commission Forecast was a net operating income of $1,401,056. Actual net operating income was $2,495,732.

leak of assets to us. These properties were part of the package bought by Capital Transit. They were paid for by the bus riders. They belonged to D.C. Transit and, in terms of social ethics, to the Washington Community. Yet we see them being transferred at book value, i.e. original cost less depreciation to wholly controlled subsidiaries whose profits are not regulated by WMATC and, apparently, are not available for the operation of buses. Considering the tremendous rise in real estate values, these properties constitute gold mines. But the gold is not shown on the books and is not available to the public or the bus riders. It is thus profit to the shareholder over and above the 100 percent dividends paid out of operating revenue.

The property in the 3200 block of M Street, N. W. may be an example. It apparently was transferred to the subsidiary in exchange for $99,605 in stock. Yet it has been able to borow $2,407,975 on a long-term note and to run up current liabilities of $672,164. These operations thus provided $3,079,000 in working capital. Some of this was probably loaned to D.C. Transit's affiliated companies investing in profitable real estate transactions. But the interest on the loans and the profits on the real estate do not get back to the bus riders, as far as we can determine.

"... whether the carrier is being operated economically and efficiently" [Compact, § 6(a)(1)]
"... at the lowest cost consistent with the furnishing of such services" [Compact, § 6(a)(3)]
"... under honest, economical, and efficient management" [Compact, § 6(a)(3)]

No rationale has been placed on the record indicating the reasonableness of expense allowances. For example, Exhibit S-7 shows:

D.C. Transit has the highest operating cost per mile of the four largest bus companies shown (87¢; the next highest being 73¢ and the others 65¢ and 59¢).

It also leads the pack in having the highest cost per mile for maintenance; the highest cost per mile for transportation and station expense; the highest cost per mile for traffic solicitation; and the highest cost per mile for administration and general expense.

Other indications of faltering efficiency appear in the high amount of labor overtime pay.

Why is this? The record offers no answer.

Yet an answer is clearly required. The whole reason for operation of D.C. Transit is the supposed increased efficiency of free enterprise. Is this theory working out in practice? The public has the right to know.

The law recognizes that inherent in regulated business activities is the constant tendency to disregard efficiency since it frequently assumes a "de facto cost plus" operation wherein there is more "plus" as there is more "cost." When the Commission states that the "staff . . . has not called into questions its [Transit's] overall efficiency" the Commission admits that efficiency has never been studied. For the staff to suggest that efficiency is to be assumed without the public hearing evidence, and to suggest that raising the question can be dismissed as "sheer speculation," is for the Commission to ignore their responsibility to the public.

Diminishing returns

Underlying this application is the dangerous assumption that the company's need for a higher profit can be realized by higher fares. Yet past history clearly indicates that fare increases inevitably result in decreased ridership, especially in the more densely populated city areas where operations are most profitable. Calculation of resistance factors does not include any realistic evaluation of past and threatened bus boycotts. The only treatment in this record of the possible effect of organized resistance to fare increases is merely polemical. If Transit fares have not already reached the point of diminishing returns, they are fast approaching it. Why then is not the classic business answer to this problem—internal economy—explored more fully in this record?

Exhibit S-11 shows some glaring need for economy:

> Operation of the Limousine Service resulted in an operating loss (before depreciation & capital charges) of over $109,000
>
> Operation of the charter and contract service resulted in an operating loss (before depreciation & capital charges) of over $108,000
>
> The Maryland Interstate operation resulted in a loss (before depreciation & capital charges) of over $774,000

Yet there is no breakdown of these losses. Counsel for Transit concedes (Tr. 1842) that the company has not even attempted to ascertain its costs on anything but a system-wide basis. The absence of such inquiry in these days of modern cost accounting is highly significant of a general lack of concern for internal economy.

2. RATE STRUCTURE

"... unduly preferential or unduly discriminatory either between riders or sections of the Metropolitan District" [Compact, § 6(a)(2)]

The lack of cost information is most acutely felt when the Commission starts to set a fare structure. Petitioner's questions about discrimination against the more densely populated urban areas were brushed aside by the Commission as being based on "a little learning." But that is all this record provides unless petitioner's request for a more scientific inquiry is granted. (Tr. 1741-42, 1746-48, 1750-54, 1781, 1784-85)

Congress requires a determination of "net operating income from mass transportation operations in the District of Columbia of any common carrier required to furnish transportation to school children at a reduced fare . . . ." § 44-214(a), D.C. Code, 1961 Ed. Act of August 9, 1955, 69 Stat. 616.

The Commission can and does make such a determination. What theoretical elements are involved in the cost allocation? The Commission has not said. The only one that suggests itself (Exhibit S-11) is Administration and General Expense. But the Maryland allocation of that item amounts to only $145,000, which is less than a 10 percent allocation of the system-wide total of such expense.

We do not know to what extent, if at all, Mr. Lewis departed "from the factual method of allocating costs on a mileage or hours basis" (in Exhibit S-11) so as to find himself "in the very difficult field of qualitative judgment as a means of assigning costs." (Tr. 774). Nor do we know precisely what alternative techniques of cost allocation he considered.

What then is the basis for questioning the obvious import of the three quarter million dollar loss on Maryland operations shown by Exhibit S-11? If we add in depreciation expense, which the Commission unaccountably failed to do, the loss on Maryland operations grows to immense proportions.

According to Mr. Bell's testimony (Tr. 104, 109) and Mr. Hatfield's (Tr. 22, 60, 47), the system-wide depreciation was about $2,710,000 in 1966. 455 buses, or 39 percent of the total fleet, were assigned to Maryland. 39 percent of total depreciation cost amounts to $1,127,000. As will be seen, this is a very modest allocation of depreciation expense in view of the heavier investment in the Maryland fleet. Adding depreciation to the operating loss of $774,000 shown by Exhibit S-11 brings the loss on Maryland operations to $1,901,000. Thus most of the fare increase awarded by the Commission is being eaten up by losses on Maryland operations.

Correlation with population density

Furthermore, this result—the unprofitableness of the Maryland operation—correlates roughly with several significant elements in the Census Tract Study of Transportation in the Washington Metropolitan Area prepared by the Office of Planning and Programming of the Department of Highways and Traffic of the District of Columbia in cooperation with the U.S. Department of Commerce and Bureau of Public Roads, 1965.

It correlates with population density (Exhibit II 4).

It correlates with population income (Exhibit III 1).

It correlates with Auto Availability (Exhibit IV 1).

It correlates with Auto or carpool usage for work trip (Exhibit V 1).

The Commission should make further inquiry into the significance of these subjects, their impact on the cost and kind of service rendered by Transit, and give some appropriate recognition to this type of data in equalizing the fare structure.

Promotion of unprofitable suburban business

The Maryland Service Area—the most unprofitable—is precisely where Transit's advertising and service improvement efforts are concentrated.

Mr. Bell testified (Tr. 104) that "455 vehicles are now assigned to operate in the State of Maryland providing 22,105 seats . . . the average age of the assigned Maryland fleet is 5.48 years."

Mr. Hatfield testified (Tr. 60), "The average age of buses has been reduced from 11.50 to 6.48 years. . . ." If the average age of the 1191 bus fleet is 6.48 years, and if the 455 buses serving Maryland have an average age of 5.48, then the 736 buses serving D. C., including the few in

Virginia, would have an average age of 7.20 years. Thus the riding public that accounts for 86 percent of public revenue is assigned buses that are 31.4 percent older than the buses assigned to the riding public that account for 14 percent of the public bus revenues. This is clearly discriminatory in favor of the suburban riders.

Mr. Hatfield (Tr. 60) indicated that 68.7 percent of Transit's fleet is air-conditioned, and Mr. Bell (Tr. 104) indicated that 399 air-conditioned buses are assigned to the 455 bus fleet in Maryland. Mr. Hatfield (Tr. 22) indicated that 818 air-conditioned buses had been purchased by D. C. Transit. Assuming these buses are all still in operation, then there are 419 air-conditioned buses assigned to the 736 bus fleet serving the District, and that figure includes whatever number are assigned to the Virginia operations.

399 out of a 455 bus fleet or 87.7 percent is air-conditioned. They serve riders who account for only 14 percent of Transit revenues. In the District, only 419 buses are air-conditioned out of a 736 bus fleet, again discounting the Virginia area which is negligible. Thus, only 57.7 percent of the District fleet is air-conditioned, and the District riders are accounting for 86 percent of public Transit revenues.

On the basis of income derived from Maryland vis-a-vis the District, only 14 percent of the air-conditioned buses, or 114 air-conditioned buses, should be assigned to Maryland. Thus, 285 of the 399 air-conditioned Maryland buses should be re-assigned to the District. Instead of the District being assigned only 419 air-conditioned buses, the District should be assigned 704 air-conditioned buses. But the basic discrimination, however, consists in the unbelievably disproportionate number of buses assigned to the Maryland area in relation to the passenger load. Most of the expensive equipment is applied where it is least profitably employed.

The apparent assumption is, "We lose money on every deal but we make it up on the volume."

The advertising dollar, the new investment in luxury, all go to enticing the rich, suburban, multi-car owner, in the most sparsely populated areas where operations are most unprofitable.

Neglect of the captive center city

On the other hand, the center city area, where operations are most profitable, is uncultivated. Thus, whether the Commission admits it or not, it is in effect following the Garfield and Lovejoy thesis of charging the captive customer, who has no alternative way to travel, a higher rate than those who do.

In the present case, this can be roughly translated as a "soak the poor policy." People who live in the most densely populated areas, where incomes are lower, and automobiles rare, provide the highest profit margin—high enough to subsidize their richer suburban neighbors who do not care to use D.C. Transit much in the first place.

There is obviously a great need for a more careful analysis of this subject. The social significance is very great, and it requires careful study. (Consider, for example, the reprint in the record from HUD's Division of Public Affairs, in January, 1967.)

Trends in urban—suburban inequities

Between 1963 and 1966, the population of D. C. increased by 2 percent from 792,000 to 808,000 (Ex. R-10), whereas the ridership increased by 3.2 percent from 108,802,000 to 112,320,000 (Ex. R-7), and this 3.2 percent ridership increase applied to 86 percent of public transit income.

By comparison, between 1963 and 1966, the population of the Maryland service area increased by 13.4 percent from 546,000 to 622,000 (Ex. R-10) whereas the ridership

increased by only 13.6 percent from 11,912,000 to 13,532,000 (Ex. R-7) and this ridership increase applied to only 14 percent of transit income.

Thus while the D. C. ridership is increasing 1.6 times as fast as the increase in population, the Md. ridership is barely keeping pace with the population increase. The Commission is in error when it states that "the suburban portions of the company's service were shown in this record to be the areas where the company is experiencing a growth pattern." If we look at the 1965-1966 Maryland trend, the Maryland service area population increased by 4.7 percent from 594,000 to 622,000 (Ex. R-10) whereas the Maryland ridership increased by only 1.4 percent from 13,393,000 to 13,532,000 (Ex. R-7).

Taking first the D. C. projections, in the period 1963-1966 the ridership per resident, a rough indicator relating population to ridership shows that the ridership per person is about constant, increasing only from 143.8 to 144.0. The projections suggest a drop to 143.0, a suggestion which is not in any way supportable by the Transit Commission's own expert's data. If we project instead, what the data does suggest, a constant ridership or a 1 percent increase in ridership, we project either 120,100,000 or 121,300,000 riders in 1970 and not the 119,300,000 as shown.

Turning to the Maryland service area, however, a very different projection fits the experience data. From 1963 to 1966, there was a 4.2 percent drop in ridership per person. (21.8 to 20.9) If we project this 4.2 percent ridership drop that did occur from 1963-1966 into the 1967-1970 period, the 1970 ridership projection would be 13,890,000 and not the 14,500,000 as shown.

From this same R-10 data a further and possibly more accurate projection can be made. From 1965 to 1966, the ridership per resident in the Maryland service area dropped from 22.0 to 20.9, a 5 percent drop. If we project a 5 per-

cent yearly ridership drop, the 1967 projected ridership would be 12,650,000 and not the 13,400,000 as shown; the 1968 projected ridership would be 12,330,000 and not 13,800,000 as shown; the 1969 projected ridership would be 11,660,000 and not 14,500,000 as shown. Thus a 5 percent yearly drop projected into 1970 would reduce this projected ridership by 20 percent.

Escalation of fare inequality

Not only do the central city operations now subsidize the suburban operations, but by any conceivable interpretation, interpolation or projection of the Commission's own expert data and testimony, the prospects are for a further increase and escalation of the fare inequality. This is reflected in Ex. R-9 which shows that the passengers per vehicle mile on the regular routes have increased from 1963 to 1966 in D. C. by 4.6 percent, (4.07 to 4.21) whereas in the Maryland service area there has been a decrease of 3.4 percent. (2.39 to 2.31)

The logical explanation for this is that the D. C. area is a constant size so that as the population increases the density of the population per square mile increases, and thus the number of riders per bus mile travelled would naturally increase. This increases the profitability in D. C.

In Maryland service area, however, opposite factors are operable. Suburban sprawl spreads bus riders out so the density factor is adverse. Thus, more miles must be travelled to carry fewer passengers, and the already considerable and substantial Maryland service area losses are increased.

Cost data and statutes

The Commission cannot relate to "unjust, unreasonable or unduly preferential or unduly discriminatory" fares between "riders of sections of the Metropolitan District" without relating revenues produced to costs. Article XII,

Section 4(1) is not opposed to this. ". . . The fact that a carrier is operating a route or furnishing a service at a loss shall not, *of itself,* determine the question of whether abandonment of the route or service over the route is consistent with the public interest as long as the carrier earns a reasonable return." (Emphasis added) The clear meaning of the law is that a given route may be operated at a loss but this loss must not be such as to be "unjust, unreasonable, or unduly preferential or unduly discriminatory either between riders or sections of the Metropolitan District." Furthermore, the law uses the word "efficient" several times. Clearly Congress intended that the Commission make a serious inquiry into the efficiency of the transit operator. Yet, the Commission has clearly never made any serious or even semi-scientific inquiry into the transit operator's efficiency.

Data available

Data is readily available which would form a key part from which more realistic internal profitability studies could be made.

> MR. SPEAR: What we do have is the system cost per mile information. We also have traffic studies of particular routes and lines, as you call them.
>
> The traffic studies are not to be confused with cost studies. If I said that, I would like to correct it. I thought I had talked of traffic studies. If I said cost studies, I was wrong.
>
> There was testimony about traffic studies in the record, and we do have the traffic studies and the work papers. Those are available, and we do have the system cost-per-mile information. (Tr. 1842-1843)

On page 42 of Order No. 684 the Commission states, "It was testified by both Mr. Bell, a vice-president of the company, and Mr. McElfresh, that it was not practicable to break cost figures down to obtain an accurate cost picture

as to a particular route. Herein lies another fallacy in the position Movants urge upon us." Mr. Bell's testimony beginning on page 68 and continuing through page 110 does not even relate to cost analysis. Nowhere does he indicate that cost analysis techniques could not be related to a bus company. To the contrary, he gives several examples of traffic check procedures which D.C. Transit has used and which include relating to the "transfer problem" which would be one of the complicating factors in cost analysis. Any reasonable interpretation of Mr. Bell's testimony would lead to the conclusion that passenger counts, one of the principal factors in cost analysis as related to a bus company operation, are quite practical and in fact are done by the bus company. Mr. McElfresh actually admitted that cost analysis had been applied to bus company operations on a line by line basis. (Tr. 1768-1769, 1790-1793)

No rationale for rate structure promulgated

There is no rationale in the record for a rate structure different from that proposed by D.C. Transit.

> MR. DOWDEY: He has proposed one rate structure, but it would seem to me it would not be a rash guess to expect that would not be accepted, and that the Commission, even if it granted a fare increase, would grant it in different terms than the precise form of his asking.
>
> MR. SPEAR: The fare structure proposed was the one that the company believed to be the optimum. By "the one" I mean it was the only one that was filed or projected in this proceeding, or as to which all of the detailed work that had to be done in a proceeding like this was in fact done. Now, whether somebody else has another system, I don't know, but we offered no other and have no computations for any other.
>
> MR. DOWDEY: In other words, there is no rationale for any other?
>
> MR. SPEAR: There is no rationale for any other. (Tr. 1843-1844)

But the Commission has never taken testimony or made any attempt whatsoever to develop evidence on the rate structure it has adopted. Thus it is implied that there is no expertise needed to determine the fare structure question, or that the problem has an obvious and simple answer, or that they themselves have the expertise in this area which they admit lacking in the "fair return" area.

Furthermore, the Commission cannot transfer their responsibilities to any other party, and most certainly they cannot shift this responsibility to the public. The Commission has taken testimony, developed evidence and considered reflectively on the "fair return" question, as indeed it has done in other previous years. To the contrary, the Commission has never taken testimony, developed any evidence whatsoever and therefore has never considered the "fair fare" question reflectively or otherwise, either in this yar or in any previous year.

CONCLUSION

The court should, therefore, direct the Commission to give fuller consideration to the bases (a) for fixing its rate of return, and (b) designing its fare structure. The court should also set aside Washington Metropolitan Area Transit Commission Order No. 684, enter an order of restitution, and grant such other and further relief as to the court may seem just and proper.

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BRIEF FOR INTERVENOR

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,988

THOMAS E. PAYNE, et al.,

Petitioners,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION,

Respondent,

D. C. TRANSIT SYSTEM, INC.,

Intervenor.

PETITION TO REVIEW ORDER
OF THE
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

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QUESTIONS PRESENTED

1. Have Petitioners shown that Commission Order No. 684 was illegal, arbitrary or capricious?

2. Have Petitioners shown that the Commission in issuing Order No. 684 failed to make the inquiry into the rate of return to be allowed Transit required by this Court?

3. Have Petitioners shown that there was no substantial evidence in the record to support the Commission's finding that the fare structure authorized by Order No. 684 was neither unduly preferential nor unduly discriminatory, or that such finding was arbitrary or capricious?

I N D E X

TABLE OF CASES CITED

TABLE OF STATUTES CITED

* Cases or authorities chiefly relied upon are marked by asterisks.

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BRIEF FOR INTERVENOR

COUNTER-STATEMENT OF THE CASE

This Brief is submitted on behalf of D. C. Transit System, Inc. ("Transit"), in response to the Brief of Thomas E. Payne, individually and representing the Metropolitan Citizens Advisory Council, Lonnie King, individually and representing the Young Democrats of the District of Columbia, and 13 other individuals ("Petitioners"), who have petitioned this Court to review Order No. 684 of the Washington Metropolitan Area Transit Commission ("Commission"), served March 13, 1967.

The "Statement of the Case" of Petitioner need not be expanded upon here; however reference is made herein to the "Statement of the Case" in Transit's Brief for Petitioner in the companion case of D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Comm'n (Case No. 21,029) in which Transit seeks reversal of Order No. 684 on grounds other than those raised in this appeal.

STATUTES INVOLVED

This appeal involves, in part, the construction of Section 4 of Transit's Congressional Franchise, Public Law 84-757, 70 Stat. 598 (1956) ("Franchise") and Sections 4(i), 6(a)(1), 6(a)(3), 6(a)(4) and 17(a) of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), 1 D.C. Code 55, 1410-1416 (1961 ed.) ("Compact").** The relevant parts of the foregoing are set forth in the Appendix hereto, infra.

SUMMARY OF ARGUMENTS

Petitioners have failed to show that Commission Order No.

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* Transit was granted permission to intervene in this case (No. 20,988) by per curiam order of this Court filed August 14, 1967.

** Unless otherwise indicated, all citations to the Compact shall be to Title II, Article XII.

684 is not supported by substantial evidence or is in error as a matter of law.

A ruling of an administrative agency is presumed to be valid and will not be set aside unless it is clearly illegal, arbitrary or capricious

Petitioners have failed to sustain the burden of showing that Commission Order No. 684 was illegal, arbitrary or capricious Petitioners do not argue that the Commission's findings are not supported by substantial evidence in the record but principally rely upon allegations and assertions which were not placed in evidence and which, therefore, do not form a part of the record before the Commission.

The Commission did make the broad inquiry into rate of return called for by this Court

The Commission did not err in adopting the "Alternative Use Value Theory" of Dr. Roberts and did not require further evidence on rate of return than was present in the record

Petitioners are in error in suggesting that Dr. Roberts' "Alternative Use Value Theory" automatically results in an increase in fares whenever there is an increase in land values. Dr. Roberts himself denied that this was the case and acknowledged that cost-of-capital was only one of many factors he took into account in determining an appropriate rate of return for Transit.

Petitioners' contention that the Commission should have heard from experts on other theories of rate of return than the "Alternative Use Value Theory" is without merit. The "Alternative Use Value Theory" is not a rate of return theory, but rather a method of determining cost of capital. There was sufficient evidence in the record to support a rate of return of at

least that recommended by Dr. Roberts and in fact the Commission heard extensive testimony of another expert on rate of return, who recommended a rate of return for Transit in excess of that recommended by Dr. Roberts. Petitioners had an opportunity to present evidence on rate of return, but failed to do so.

The Commission adequately inquired into Transit's dividend history and did not err in basing the allowable return on equity on Transit's present equity capital rather than on its original equity capital.

Petitioners' contention that an adequate inquiry into Transit's dividend history would have shown such dividend payments had been excessive and therefore the Commission should have limited Transit's return to a return on its original equity capital is without merit. The Commission made a comprehensive review of the present risks faced by Transit's investors and correctly concluded that present risks rather than past risks were relevant to determining an appropriate rate of return. If, as Petitioners suggest, the Commission had based its rate of return on the original equity investment in Transit rather than the current equity investment, the Commission would have been in violation of this Court's decision in D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Comm'n, 121 App. D.C. 375, 350 F.2d 753 (1965).

In any event, there was substantial evidence in the

record showing that Transit's past dividends had not been excessive. What is more, Transit had omitted its October 1966 dividend in its entirety and there was evidence in the record showing that this could adversely affect Transit's financial stability in the eyes of the financial community. In short, there was no support in the record for the conclusion that Transit's dividend payments, past or present, had been excessive.

The Commission did not fail to make an adequate inquiry into Transit's land operations and those of its subsidiaries

There was substantial evidence in the record relating to the real estate owned by Transit and that owned by its subsidiaries. Petitioners' contention that the record is deficient as to Transit's land operations in this regard is erroneous. Moreover, under well established principles of regulatory law, real estate transactions in non-operating properties are not subject to the jurisdiction of the Commission and should not be considered and do not affect the rate of return to be allowed a public utility.

There was substantial evidence in the record supporting the Commission's conclusion that Transit would sustain a substantial loss if no fare increase were granted

The fact that existing fares were inadequate and that without a fare increase Transit would sustain a substantial loss was supported by substantial evidence. Petitioners fail to prove their

argument that such loss was "hypothetical." Their claims of excessive dividends, excessive depreciation, overstatement of reserves and inefficient and uneconomical management are entirely without factual basis and were properly rejected by the Commission.

The Commission's conclusion that the fare structure authorized by Order No. 684 was not unduly preferential or unduly discriminatory was supported by substantial evidence and was not illegal, arbitrary or capricious

The Commission was not required to inquire into Transit's costs and earnings on a route by route basis. Such an inquiry is not a sine qua non of a non-discriminatory and non-preferential fare structure. The record showed that such a study was impracticable if not impossible and was unlikely to provide facts which would serve as an appropriate guide to establishing a fair and reasonable fare structure.

There was no evidence in the record to support Petitioners' contention that Transit's District of Columbia operations were subsidizing its Maryland operations. What Petitioners are really seeking is a special fare structure for low income riders. Such a request should be addressed to the legislature and not to this Court.

Accordingly, Petitioners have failed to show that there is no substantial evidence in the record to support the Commission's finding that the fare structure authorized by Order No. 684 was neither unduly preferential nor unduly discriminatory or that such finding was illegal, arbitrary or capricious.

ARGUMENT

I

PETITIONERS HAVE NOT SHOWN THAT COMMISSION ORDER NO. 684 IS CLEARLY ILLEGAL, ARBITRARY OR CAPRICIOUS

It is a fundamental principle of administrative law that a ruling of an administrative agency is presumed to be valid and will not be set aside unless it is clearly illegal, arbitrary or capricious. Oklahoma-Texas Trust v. SEC, 100 F.2d 888 (10th Cir. 1939). As will be developed in this Brief, Petitioners have failed to sustain the burden of showing that Commission Order No. 684 was illegal, arbitrary or capricious.

A greater part of Petitioners' Brief consists of a series of rhetorical questions predicated upon assertions and allegations which have no basis in the record and as to which no evidence was introduced.

Petitioners do not argue that the Commission's findings are not supported by substantial evidence in the record but quote extensively from what they describe as the "Citizens Council memorandum to the Board of Commissions of December 16, 1966" (Petitioners' Brief, pp. 6-9). The Citizens Council memorandum was not offered or admitted in evidence before the Commission and the proponents of the allegations contained therein could not be cross-examined as to the sources or the

basis thereof. It is therefore inappropriate for Petitioners to refer to and quote from that memorandum in their Brief, thereby creating the misleading impression that that memorandum and the alleged statements of fact therein are part of the record in this case. Accordingly, Transit submits that all such references and quotations contained in Petitioners' Brief should be ordered stricken therefrom, or in the alternative entirely disregarded by this Court.

In the expert judgment of the Commission, the fare structure authorized by Order No. 684 was determined on an area-wide basis and was not unduly preferential or discriminatory between riders in the different sections of the Washington area. Unless the Commission has clearly acted in an illegal, arbitrary or capricious manner, the judgment of the Commission must be sustained. Petitioners in their Brief fail to establish that the Commission has so acted or that the findings of the Commission as to a proper fare structure are not based upon substantial evidence in the record.

Petitioners have thus failed to establish any basis upon which this Court could set aside Commission Order No. 684.

II

PETITIONERS HAVE NOT SHOWN THAT THE COMMISSION IN ORDER NO. 684 FAILED TO MAKE THE INQUIRY PRESCRIBED BY THIS COURT FOR DETERMINING A FAIR AND REASONABLE RATE OF RETURN FOR TRANSIT

Petitioners contend that the Commission in Order No. 684 has not made the broad inquiry into rate of return called for by this Court in D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Comm'n, supra.

In support of this contention, Petitioners urge that

(a) the Commission erred in adopting the "Alternative Use Value Theory" of Dr. Merrill J. Roberts and in failing to consider alternative rate of return theories (Petitioners' Brief, p. 4);

(b) the Commission erred in basing the allowable return on equity on Transit's present equity capital rather than on Transit's original equity capital in 1956 (Petitioners' Brief, pp. 6-7);

(c) the Commission erred in failing to make an adequate inquiry into Transit's real estate operations and those of its subsidiaries (Petitioners' Brief, pp. 8-9);

(d) the Commission erred in finding that under existing

fares Transit would sustain a substantial net operating loss in 1967 (Petitioners' Brief, pp. 7-9); and

(e) the Commission erred in failing to make an adequate inquiry into Transit's efficiency of operations (Petitioners' Brief, pp. 9-11).

As Transit will show, these contentions are without merit and do not support Petitioners' allegation that the Commission failed to make adequate inquiry into the subject of rate of return, as required by this Court.

A. The Commission did not err in adopting the "Alternative Use Value Theory" of Dr. Roberts and did not require further evidence on rate of return than was present in the record.

Petitioners contend that the Commission erred in accepting the "Alternative Use Value Theory" of Dr. Merrill J. Roberts because, under that theory, rates allegedly increase automatically with land appreciation. This contention evidences Petitioners complete misunderstanding of Dr. Roberts' testimony.

Dr. Roberts used the "Alternative Use Value Theory" not as a "rate of return theory" but as a basis for measuring the theoretical cost of capital, which is only one of the elements in determining an appropriate rate of return. He very carefully pointed out in his testimony that, under the "Alter-

native Use Value Theory", fares do not necessarily increase merely because the value of land increases, for at the same time that the value of land might be increasing, there would be a corresponding decrease in risk and cost of capital (Tr. 1448-49).

The Commission in Order No. 684 acknowledged that Dr. Roberts' theory raised the possibility that increased land values might result in increased fares (Order No. 684, p. 23). However, it took pains to point out that this was not necessarily so since appreciation in land values could lead to a lessening of risk, thus lowering the cost of capital. In this connection the Commission observed:

> "In other words, the increase in value of real estate could lead to increases in fares only if this Commission saw fit to let it do so and there are ample grounds available on wnich such results could be avoided if this were what justice required." (Order No. 684, p. 23)

Moreover, the Commission made it clear, that it was not relying exclusively on all of the steps and assumptions underlying Dr. Roberts' analysis and that in its judgment the end result of that analysis was reasonable (Order No. 684, p. 23).

Petitioners also contend that the "Alternative Use Value Theory" is only one of many possible rate of return theories. This contention evidences Petitioners misunderstanding of Dr. Roberts testimony, since the "Alternative Use Value Theory"

was a means of arriving at cost of capital, not a theory of rate of return. Moreover, Petitioners fail to specify what theories of rate of return the Commission should have considered, nor did they make any effort to present testimony on any rate of return theories at the hearing before the Commission, although they were given ample opportunity to do so (Order No. 684, p. 21).

In fact, Dr. Roberts was not the only expert on rate of return who testified before the Commission. The Commission also heard extensive testimony from Mr. V. A. McElfresh, of Zinder & Associates, an expert in the field of utility rate making. Mr. EcElfresh's testimony is discussed at great length and detail in Transit's Brief in consolidated Cases Nos. 20,744 and 21,029, pending before this Court and will not be repeated here. Suffice to say that his testimony and the exhibits introduced by him provided the Commission with substantial evidence on which to arrive at a determination of a fair and reasonable rate of return, quite apart from the testimony of Dr. Roberts. Whatever the shortcomings of Dr. Roberts' approach, there was substantial evidence in the record showing that the rate of return on gross operating revenues of 5.24% prescribed by the Commission was not excessive. Accordingly, there is no basis for Petitioners' contention that Commission Order No. 684 must be set aside because it was based solely on the "Alternative Use Value Theory" of Dr. Roberts.

B. The Commission adequately inquired into Transit's dividend history and did not err in basing the allowable return on equity on Transit's present equity capital rather than on its alleged original equity capital.

The Commission found that Transit's present equity capital was $4,207,439 and that the fares authorized by Order No. 684 would give the equity holders a return of approximately 14% on that capital in 1967. The Commission concluded that in the light of Transit's present risk situation, the return allowed by Order No. 684 was not excessive (Order No. 684, p. 31).

Petitioners urge that the Commission erred in so concluding. They contend that the return on equity should be determined on an investment of $500,000 on the erroneous theory that this amount represented the total investment of the stockholders in Transit (Petitioners' Brief, pp. 6-8). The Commission properly rejected this contention (Order No. 684, p. 31). explaining its refusal to so limit Transit's return on equity capital in the following terms:

> "[Petitioners argue] that the dividend should be tested in the light of the equity capital originally invested in the firm. This is not a view which we can accept. The appropriateness of the dividend must be tested by the hard facts of the market place for capital funds. In that forum, emotional reactions to benefits which the equity holder has accrued in the past count for little. Rather, one must look at the amount of

> capital presently in the firm and determine whether it is producing a return commensurate with the risks involved.... If the return were limited as suggested ... by [Petitioners], the cold fact is that the equity holders would probably soon withdraw their capital from this enterprise and invest it in more productive uses. We certainly could not expect a franchise holder, under those conditions, to maintain the levels of service we are seeking for this community." (Order No. 684, p. 31)

As the Commission observed, there is no rational basis for determining the allowable return on equity as though Transit's equity were $500,000 when in fact, Transit's equity book value is approximately 8 times that amount (DCT Ex. 39) and on the "Alternative Use Value Theory" of Dr. Roberts, approximately 24 times that amount (Tr. 1313).

Moreover, to the extent Petitioners urge that the return to Transit be limited to a return on $500,000, they fail to give effect to all of the considerations involved in determining the proper rate of return herein within the meaning of this Court's opinion in D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Comm'n, supra.

In fact, the record before the Commission contained substantial evidence and analysis showing that Transit's dividends in prior years were not excessive: (a) Through December 31, 1964, Transit's dividend pay-out ratio was in line with that of other regulated utilities. In 1965, a net loss was sustained

by Transit, precluding comparison (Tr. 170-71; DCT Ex. 35); (b) From 1960 through 1963, the price/earnings ratios of D. C. Transit System, Inc. (Delaware) compared favorably with those of other transit companies, but were well below the price/earnings ratios of other regulated utilities (Tr. 172-73; DCT Ex. 36); (c) Transit's history of income, rate base, equity and dividends from August 15, 1956, through August 31, 1966, indicated that Transit's earnings during such period had not been unreasonable (Tr. 179-181; DCT Ex. 39); (d) A comparison of rates of return and income deduction coverages of Transit and other urban transit companies clearly demonstrated the inadequacy of Transit's earnings (Tr. 181-183; DCT Ex. 40). The inadequacy of Transit's earnings was also shown by the losses on its common stock equity in 1965 and for the 12 months ended August 31, 1966, in comparison with returns ranging from 11% to 14% for three groups of non-transit regulated utilities (DCT Ex. 26), an 8.36% average return for 18 transit companies for the year 1965 (DCT Ex. 28), and a return of 13.30% in 1965 for the three local transit companies reporting to the Commission (DCT Ex. 30) (Tr. 186).

Had Transit's dividend payments been unreasonably high in relation to dividends paid on comparable investments of equal risk, the market price of Transit's stock would have

risen proportionately more than the stock of other utilities and urban transportation companies. However, the market prices of common stock of other transit companies and regulated industries had generally increased at a faster rate through the end of 1965 than had the market price of D. C. Transit System, Inc. (Delaware) stock, indicating that investors had appraised the investment desirability of D. C. Transit System, Inc. (Delaware) stock well below that of other urban transit companies and regulated utilities (Tr. 169-170; DCT Ex. 34).

Nowhere in Petitioner's Brief is mention made of the fact that Transit had sustained a substantial loss in 1966, necessitating the omission of its October, 1966 dividend or of the evidence in the record indicating that the discontinuance or substantial reduction in Transit's $500,000 annual dividend did adversely affect the market price of D. C. Transit System, Inc. (Delaware) stock and could result in the deterioration of the financial stability of that corporation in the eyes of the financial community (Tr. 190-191, 1132, 1133; DCT Exs. 43-45).

These facts clearly established that Transit's past dividends were not excessive. Accordingly, the Commission's rejection of Petitioner's contention that Transit's allowable return on equity should be based on Transit's original equity was not only dictated by sound regulatory principles but based on substantial evidence in the record showing that excessive

dividends had not been paid in prior years.

C. The Commission did not fail to make an adequate inquiry into Transit's land operations and those of its subsidiaries.

Petitioners imply that the record before the Commission was deficient because there was no "meaningful inquiry into land operations." In this connection Petitioners alleged that "[p]rofits, past and future, for such operations are critical to a realistic evaluation of rate of return." (Petitioners' Brief, p. 8). After making the above allegations, Petitioners cite a series of questions concerning real estate transactions raised by the memorandum of the Citizens Council of December 16, 1966 (Petitioners' Brief, pp. 7, 8).

Many of the factual statements from the Citizens Council memorandum are grossly erroneous. That memorandum was not offered or admitted in evidence before the Commission and the proponents of the misstatements contained therein could not be cross-examined on the basis for their statements (See pp. 6-7, supra).

The record before the Commission contained complete financial data relating to Transit, including balance sheets showing all real estate owned by Transit and, in addition, all real estate owned by its real estate subsidiaries (DCT Exs. 2, 6). The record before the Commission contained a net profit and loss statement for Transit's real estate subsidiaries for the year ending August 31, 1966 (S. Ex. 20) and a statement showing

inter-company exchange of funds involving Transit and its subsidiaries (S. Ex. 21). There is no basis for Petitioners' contention that the record was deficient on this subject.

Moreover, to the extent Petitioners seek to include the real estate transactions of non-operating properties in a determination of rate of return, their contention is contrary to the well-established principle that non-operating properties are not subject to the jurisdiction of the Commission and that the transactions therein should not and do not affect the rate of return to be allowed. Munn v. Illinois, 94 U.S. 113 (1877). Any losses on non-operating properties are not charged to the public, and conversely any profits on such properties do not belong to the public. Accordingly, Petitioners' contention that Order No. 684 should be set aside because of the Commission's failure to inquire into Transit's real estate operations and those of its subsidiaries is both factually and legally unsupportable.

D. The Commission's finding that under existing fares Transit would sustain a net operating loss of approximately $726,000 for the future annual period, the calendar year 1967, is supported by substantial evidence.

In Order No. 684 the Commission reaffirmed its finding in Order No. 656, served January 12, 1967, that under existing

fares Transit would sustain a net operating loss in excess of $700,000 in 1967. That finding was supported by substantial evidence in the record (DCT Ex. 4; S. Ex. 12; Tr. 30-50) and no evidence was offered which would refute that finding.

Petitioners seek to challenge the Commission's projection of a substantial operating loss for Transit in 1967 under existing fares not by referring to specific facts in the record but by asking a series of rhetorical questions which Petitioners claim will show that Transit's loss is of a "highly theoretical character" (Petitioners' Brief, p. 7).

1. There were no excessive dividends

Raising again the bogeyman of excessive dividends, Petitioners argue that Transit's payments of large cash dividends in past years makes Transit's alleged loss an imaginary one (Petitioners' Brief, pp. 7-8). They do not explain how the payment of past dividends enters into the computation of projected future losses or the determination of an appropriate rate of return. In fact, as has been shown, Transit's past dividends have not been excessive, (See pp. 13-16, supra). Furthermore, in 1966 Transit did not pay its October quarterly dividend.

Whatever dividends were paid in 1966 and prior years, there was substantial evidence in the record that Transit would sustain a substantial operating loss in 1967 under existing fares.

Accordingly, the Commission correctly found that Transit's dividend history did not conflict with its conclusions as to Transit's present financial condition and Transit's need for an immediate fare increase (Order No. 684, p. 8).

2. There was no excessive depreciation

Petitioners next attempt to impugn the Commission's finding that Transit will sustain a substantial operating loss in 1967 under existing fares by suggesting that such loss results from an excessive depreciation allowance (Petitioners' Brief, pp. 7-8). Again Petitioners fail to point to a single item of evidence in the record supporting their contention.

The Commission projected Transit's depreciation expense in 1967 under existing fares at $2,964,321 (Order No. 684, p. 8). That amount, representing an increase of $252,504 over the amount of depreciation for the year ending August 31, 1966, was set forth in detail in the record (DCT Ex. 4, Sch. 6) and was computed in accordance with the provisions of Commission Order No. 381, served September 11, 1964, a copy of which was also made part of the record (DCT Ex. 4, Sch. 7). The principal increase in depreciation for the calendar year 1967 over the 12 months ended August 31, 1966 resulted from (i) Transit's acquisition of 100 new buses in June, 1966 on which depreciation had been reflected for only two of the 12 months ended August 31, 1966, and for which depreciation had to be reflected for the full

12 months of the calendar year 1967 and (ii) Transit's proposed acquisition of 100 additional new buses in June, 1967 for which depreciation was to be taken over 12 years, with 6% salvage, in accordance with the provisions of Order No. 362, served May 27, 1964, a copy of which was also made part of the record (DCT Ex. 4, Sch. 8).

The Commission properly rejected Petitioners' claims of excessive depreciation in the following terms:

> "[T]he depreciation allowance is not a figure set at the whim of the company. The company's depreciation rates are prescribed by this Commission. They were reviewed thoroughly as recently as 1964. In that year, the Commission entered two orders, Nos. 362 and 381, which established depreciation rates on all classes of property owned by D. C. Transit. Order No. 381 was based upon an exhaustive study of depreciation practices of the company made by the well-known engineering firm of Stone & Webster Service Corporation. Order No. 362 not only prescribes the depreciation rate but requires that a fixed number of buses, equal to one-twelfth of the fleet, be purchased each year, thus giving assurance that the depreciation rate will be tied to the life of the buses. Nor was the subject of depreciation rates ignored in this proceeding. The staff suggested a change in depreciation rates as a means of avoiding a fare increase. For reasons spelled out in Order No. 656, we rejected that approach. The Movants [Petitioners] presented not one single fact to challenge the previously established depreciation schedules. Absent any basis

upon which they can be challenged, we must decline to disturb them." (Order No. 684, pp. 8-9).*

The Commission correctly found that Petitioners' claim of excessive depreciation was entirely without merit. No basis existed for attacking Transit's depreciation before the Commission. Nor have Petitioners shown any basis for their claims of excessive depreciation in their Brief in this appeal. The $2,964,321 of depreciation for 1967 projected by the Commission resulted from the proper application of the depreciation rates established by outstanding Orders of the Commission (Orders Nos. 362 and 381), which Petitioners did not challenge during the hearing and which cannot be subject to collateral attack on this appeal.

3. There was no overstatement of reserves or underapplication of the acquisition Adjustment Account

Lastly, Petitioners attempt to show that Transit's projected operating loss for 1967 is of a "highly theoretical character" by questioning Transit's reserve accounts. Petitioners suggest, again without specific reference to any particular account or to any evidence in the record, that Transit's reserve accounts are overstated and therefore "result in hidden profits to the company." (Petitioners' Brief, p. 8). In addition

* In Order No. 656 the Commission rejected the Staff's suggestion that the bus renewal and replacement program be suspended for 1967 with a concomitant adjustment in the rate of depreciation from a 12 year life to a 13 year life (Order No. 656, p. 17).

Petitioners suggest that there has been "underapplication" of Transit's Acquisition Adjustment Account which according to Petitioners, also results in hidden profits to Transit.

The Commission properly rejected these contentions for reasons clearly set forth in Order No. 684, as follows:

> "[Petitioners] suggest no reason, or basis for belief, that these reserves were overstated. As we pointed out in Order No. 656, the staff of the Commission audited and thoroughly analyzed the company's books, and adjustments to the operating statement were made on the basis of this audit. We would certainly not be justified in rejecting evidence undisputed on the record simply on the basis of an unsupported allegation that if something were wrong with the deductions for reserves, hidden profits would result. We are reinforced in this conclusion by the lack of merit in [Petitioners'] one reference to a specific reserve account. Having made their general observation [Petitioners] go on to contend that no meaningful inquiry was made into the Acquisition Adjustment Account. This subject was, in fact, thoroughly and repeatedly explored in the testimony of record, and in Order No. 656, we carefully discussed whether we should make use of the Acquisition Adjustment Account in lieu of adjusting fares. [Petitioners'] claims on this point are patently without merit and provide no basis for questioning our conclusions as to the operating results to be expected under existing fares." (Order No. 684, p. 9.)

As the Commission observed, the record contained substantial evidence relating to the Acquisition Adjustment Account and Transit's reserve accounts (Acquisition Adjustment Account: Tr. 48, 232, 274-275, 685-687, 770-771, 775, 778, 813-838, 843-869, 976-978, 1033-1034, 1180-1183, 1319, 1814, 1815; DCT Exs. 1, 4, 39; S. Exs. 9, 10, 12, 13); (Reserve

for Injuries and Damages; Tr. 690-693, 738-739; DCT Ex. 39); (Special Court-Ordered Reserve: Tr. 47-48, 202-203, 566-567, 572-575, 765-766, 770-771, 852, 1549-1550; DCT Ex. 4, Sch. 9, DCT Exs. 33A, 39; S. Exs. 5, 9, 10); (Reserve for Track Removal and Repaving Tr. 48-50, 264-265, 574, 690-693, 738-740, 770, 775, 778-779, 1045, 1285-1286, DCT Ex. 1). None of such evidence supports Petitioners' claim of hidden profits to Transit. Accordingly, the Commission's finding that Petitioners' contentions on this issue were patently without merit, must be sustained.

E. The Commission did not err in failing to find that Transit was not being operated economically and efficiently.

Petitioners contend that the record is deficient in failing to provide a rationale for certain expense allowances which Petitioners allege to be excessive (Petitioners' Brief, p. 9). Petitioners base this contention on Staff Exhibit 7 which sets forth the operating statistics for the calendar year 1965 of a number of transit companies reporting to the Interstate Commerce Commission. It is Petitioners' view that Transit's overall efficiency is brought into question because of the fact that Transit's expense figures exceed those of four other transit companies shown on that exhibit (Petitioners'

Brief, pp. 9-10). In addition, Petitioners claim that Transit's alleged losses for the year ended August 31, 1966, on its Limousine Service, Charter and Contract Service and Maryland Interstate Operations, as set forth on Staff Exhibit 11, establish the fact that Transit has not been operating economically (Petitioners' Brief, pp. 10-11).

Petitioners are mistaken in stating that the subject of efficiency was not explored at the hearings. Both Dr. Roberts and Mr. McElfresh were cross-examined by counsel for Petitioners on this very subject. Both experts agreed that no conclusions as to Transit's efficiency could be drawn from Staff Exhibit 7 (Tr. 1553-1555, 1728-1736). Indeed Mr. McElfresh testified that in his opinion Transit was an extremely efficiently managed company (Tr. 1717, 1736).

The Commission's refusal to draw any implication of inefficiency from the data set forth on Staff Exhibit 7 was reasonable and proper. As the Commission observed:

> "Figures on operating expenses are so affected by the peculiarities of a given operation that little can be concluded from a mere comparison

> of end results of one company to another. Rather than reach a conclusion by sheer speculation based on faulty data, we prefer to rely on our knowledge that our staff, in whom we have great confidence, maintains a constant watch on the company's operation and has not called into question its overall efficiency." (Order No. 684, p. 10)

Nor is there any basis for Petitioners contention that Staff Exhibit 11 "shows some glaring need for economy" in Transit's operation (Petitioners' Brief, p. 11). With respect to the first item on that Exhibit, limousine service, Petitioners ignore the fact that limousine operations have been excluded from projections for the future annual period (DCT Exs. 4, 5).

With respect to the second item on Staff Exhibit 11, charter and contract service, Petitioners fail to recognize or make any allowance for the savings effected for the benefit of the transit riders through the charter and contract service. Although such services may appear to be operating at a loss, they actually provide a net benefit to the transit riders because they absorb overhead expenses of equipment and they absorb idle hours of labor during the non-peak hours, which, if there were no such charter and contract service, would fall as additional expenses upon the transit riders.

With respect to the final item on Staff Exhibit 11, the so-called Maryland Interstate loss, and with respect to Staff Exhibit 11 in general, Petitioners have failed to recognize the special and limited purpose for which that Exhibit was introduced into evidence.

The witness who sponsored Staff Exhibit 11 (Melvin Lewis, then Acting Executive Director of the Commission) explained that the computations and allocations between Maryland and the District of Columbia set forth in that exhibit were prepared in connection with the certification to the Board of Commissioners of the District of Columbia for purposes of determining whether or not Transit was entitled to a school fare subsidy from the District of Columbia pursuant to 76 Stat. 113, Public Law 87-507 (1962), D.C. Code §44-214a (1961 ed. 1966 Supp.) (Tr. 772).

As witness Lewis pointed out, costs as between Maryland and the District of Columbia were allocated on a joint-product basis and without regard to the interrelationship of the transportation and travel patterns between these two parts of the Washington Metropolitan Area (Tr. 773). In his testimony, Lewis explained that, if proper weight were to be given to all of the operational problems and to the interrelationship between suburban and central city transportation, an "incremental cost basis" would be required for allocation of

costs. Such incremental cost basis would result in allocating to the operations within the District of Columbia its fair share of overhead costs. Such costs were not included in Staff Exhibit 11 and, if included, would cause the costs of the District of Columbia operations to "sky rocket" (Tr. 773) (Order No. 684, pp. 40, 41).

Thus the only evidence on which Petitioners base their claims of inefficient and uneconomical operation, Staff Exhibits 7 and 11, do not support those claims. Accordingly, there being no evidence in the record which substantiates Petitioners' contentions, the Commission did not err in failing to find that Transit's operations were inefficient and uneconomical. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

III

THE COMMISSION'S CONCLUSION THAT THE FARE STRUCTURE AUTHORIZED BY ORDER NO. 684 WAS NOT UNDULY PREFERENTIAL OR UNDULY DISCRIMINATORY WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ILLEGAL, ARBITRARY OR CAPRICIOUS

In Order No. 684, the Commission established a fare structure which, among other things, increased the cost of tokens from 4 for 85¢ to 4 for 98¢, retained the 25¢ cash fare and free transfers, and generally increased Maryland intrastate and interstate fares, except for reductions in the outermost Maryland zones (Order No. 684, pp. 34-37, Appendix).

The Commission in Order No. 684 went to great lengths to analyze the existing fare structure and to set forth the rationale underlying the changes established by its order. It compared existing fares with new fares on an average fare basis (Order No. 684, pp. 36a-37). It also compared projected 1967 revenues from Maryland local and interstate fares with projected 1967 revenues from District of Columbia fares (including interline fares), under both existing and new fares (Order No. 684, p. 38; DCT Ex. 5; S. Ex. 4). The Commission noted that Maryland intrastate zone fares had not been changed since 1955 and that

the interstate express fare structure had been in effect since 1960. It noted further that the net effect of the change in fares authorized by Order No. 684 was that the Maryland suburban rider would bear a proportionately greater share of the increase in fares than District of Columbia riders (Order No. 684, p. 38). With respect to the retention of the 25¢ cash fare, the Commission observed that that fare was generally in line with or lower than that in other cities of comparable size (Order No. 684, p. 36). The Commission concluded that the fares authorized by Order No. 684 were not unduly preferential nor unduly discriminatory either between riders or sections of the Washington Metropolitan district (Order No. 684, p. 44).

Petitioners challenge the Commission's conclusion that the fare structure authorized by Order No. 684 was not unduly preferential or unduly discriminatory. They contend that it is impossible to set a rate structure without a comparative analysis of costs and earnings by routes and that the failure of the Commission to undertake such "scientific" study has produced a rate structure which unduly burdens and discriminates against District of Columbia riders who, Petitioners allege, are forced to subsidize Maryland operations (Petitioners' Brief, pp. 4, 5 11-20).

A. The Commission did not err in failing to make a route by route cost and earnings analysis.

The basic assumption underlying Petitioner's contention that the Commission erred in failing to make a so-called scientific study of comparative costs and earnings on a route by route basis is that a fare structure must be predicated upon such data if it is to be non-discriminatory. That assumption is without legal or factual basis.

The record before the Commission shows the immpossibility of making any kind of analysis or study of the comparative profitability of each of the different routes operated by Transit. In a large urban transit system, the transit services provided by each of the different routes and areas serve different purposes and contribute in different ways to the inter-related overall area-wide transit system. There is no accurate way of measuring the relative contribution or importance of any region or neighborhood or route to the overall ridership of the area.

Before it is possible to analyze and evaluate the comparative profitability of a particular route, it is necessary first to make judgments as to the respective bases for allocations for each of the differences in revenues and costs for each portion of each route, which, in turn, may vary from day to day and from any one time of the year to another. In this connection

there was testimony in the record showing the impracticality of breaking down cost figures to obtain an accurate cost picture as to each particular route (Tr. 1776-1777).

As the Commission observed, the so-called "scientific study" of comparative costs and earnings, which Petitioners regard as the sine qua non of a nondiscriminatory fare structure is really not "scientific" at all and clearly is not indispensable to the formulation of a just and reasonable fare structure.

> "[Petitioners] ask for a 'scientific study' to determine the profitability of specific routes. They thus imply that it would be possible to reach a specific and fixed answer as to the cost of operating a given line and the profits being earned thereon. In fact, this could never be done because there is no fixed and knowable answer as to what such costs are. To achieve such a result, the thorny problem of allocating joint costs would first have to be overcome. Every line in the company's operation not only bears those costs directly attributable to it but it must also be assigned some portion of the myriad costs which are common to all lines. The assignment of these joint costs could be based on any one or more of dozens of factors, and any particular basis would have many arguments both for and against it. This is not to say that some answer could not be reached but to regard it as a 'scientific' result would be sheer naivete. In fact, the answer would involve judgment piled upon judgment.
>
> The end result might provide some interesting, and perhaps even some useful information. It would hardly be indispensable to formulating a just and reasonable fare structure, however. We have already pointed out that many lines and routes must be operated by the company regardless of their

> profitability. Moreover, some of these cost factors on a given line would be so volatile that basing fare structure decisions on them as of a given moment could lead to results which would quickly become inequitable." (Order No. 684, pp. 42, 43)

Moreover, even if it were practicable to determine cost and earnings on a route by route basis, there is no basis for Petitioners' assumption that non-discriminatory fares must be established on a strict cost of service basis.

The present regulatory pattern for the Washington Metropolitan Area contemplates that the entire Washington Metropolitan Area including the operations within Virginia, Maryland and the District of Columbia, shall be regulated "... on a coordinated basis, without regard to political boundaries within the Metropolitan District..." (Compact, Title I, Article II).

The Commission's rejection of the strict cost of service approach urged by Petitioners was consistent with its responsibilities under the Compact, as set forth above. In this connection the Commission's cogent analysis speaks for itself:

> "The function of a public mass transit system is to provide public transportation on a rational basis for the entire area served by the system. It is inherent in that objective that some routes will not produce revenues equal to the costs involved in providing the service. Service could not be denied to such areas since this would either deprive residents thereof entirely of transportation or force them into the use of their own automobiles, thus increasing traffic congestion and defeating

> the overall purpose of a mass transit system. Nor is the answer simply to raise the price of service to such areas to a level which will cover costs. As soon as transit fares become roughly comparable to the cost of operating a private vehicle, the rider will switch to his automobile, again defeating the end sought by having a mass transit system. Indeed, it is probable that the cost of public transportation must be kept considerably under that of private transportation to retain transit riders who would otherwise be attracted by the convenience of using their own vehicles. Thus, we feel that the basic premise of [Petitioners'] suggestion is highly questionable in terms of sound transportation planning." (Order No. 684, p. 39)

If the logic of Petitioners' proposal were carried out, and if high patronage routes were to receive special reduced fares, the result would be that any route on which patronage was relatively light, would have to be eliminated. Such result would violate the clear purpose of Section 4(i) of the Compact, which provides that a carrier can be required to operate any given route or service even if it is being operated at a loss so long as the carrier is earning a "reasonable return" on an overall area-wide system basis. As the Commission observed, the foregoing section of the Compact requires the rejection of the theory propounded by Petitioners and carries the further implication that a just and reasonable fare structure need not be one which is based on a cost of service concept (Order No. 684, pp. 39, 40).

B. There is no evidence in the record to support Petitioners' contention that District of Columbia operations are subsidizing Maryland operations

Petitioners' contention that the District of Columbia riders are subsidizing Maryland riders is based in part on the so-called Maryland Interstate loss which Petitioners contend is established by Staff Exhibit 11. As has been shown that exhibit was prepared for a limited purpose only and, according to its sponsor, does not accurately reflect an allocation of costs as between the District of Columbia and the suburbs (Tr. 773). Indeed, as the Commission's Chief Accountant stated:

> "[W]ithout charter and contract work to pick up slack time, and without the Maryland interstate traffic to feed into the central city, the overhead costs permeating the entire company would have to be borne by the D. C. operations alone, and the computed cost per mile in the city would skyrocket as a result." (Tr. 773)

Petitioners' attempt to show discrimination against District of Columbia riders by asserting that there are a disproportionate number of buses assigned to the Maryland area in relation to the passenger load is based on a misreading of the record. The 455 buses which Petitioners claim serve the Maryland area in fact represents the number of actual

vehicles licensed to drive into Maryland. Many of these vehicles serve primarily in the District of Columbia and only go into Maryland as a minor incident to that service. Others, while licensed to go into Maryland if needed, are not used there on a given day.

What Petitioners are really seeking under the guise of challenging Order No. 664 as discriminatory is a special fare structure for low income riders.

That kind of special fare is inconsistent with the basic concept that public utilities are supposed to treat all consumers alike, regardless of the special economic considerations of any particular consumer group. To establish a precedent of special favoritism to one economic group could well lead to utility rate anarchy with different economic groups asking for special rates for water, electricity, gas and telephone services.

Under the Compact the Commission is charged with the responsibility of establishing non-discriminatory and non-preferential fares. It is not empowered to provide Petitioners with the special fares they seek. If Petitioners wish special consideration for special economic reasons, their efforts should be directed to the legislative branch of the government.*

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* Special fares have been established by Congress for school children. 76 Stat. 113, Public Law 87-507 (1962), D. C. Code §44-214a (1961 ed., 1966 supp.).

This Court is not the appropriate forum for the special relief from the costs of urban transportation which Petitioners seek.

CONCLUSION

For the reasons stated above, it is respectfully submitted that Order No. 684, insofar as it is appealed from in case No. 20,988, be affirmed.

Respectfully submitted,

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D. C. Transit System, Inc.

Dated: December 20, 1967

APPENDIX A

STATUTES INVOLVED

I

Section 4, Title I, Public
Law 84-757, 70 Stat. 598 (1956)

Sec. 4. It is hereby declared as a matter of legislative policy that in order to assure the Washington Metropolitan Area of an adequate transportation system operating as a private enterprise, the Corporation, in accordance with standards and rules prescribed by the Commission, should be afforded the opportunity of earning such return as to make the Corporation an attractive investment to private investors. As an incident thereto the Congress finds that the opportunity to earn a return of at least 6-1/2 per centum net after all taxes properly chargeable to transportation operations, including but not limited to income taxes, on either the system rate base or on gross operating revenues would not be unreasonable, and that the Commission should encourage and facilitate the shifting to such gross operating revenue base as promptly as possible and as conditions warrant; and if conditions warrant not later than August 15, 1958. It is further declared as a matter of legislative policy that if the Corporation does provide the Washington Metropolitan Area with a good public transportation system, with reasonable rates, the Congress will maintain a continuing interest in the welfare of the Corporation and its investors.

II

Pertinent parts of Sections 4(i),
6(a)(1), 6(a)(3), 6(a)(4) and 17(a)
Article XII, Title II,
Washington Metropolitan Area Transit
Regulation Compact, Public Law 86-794,
74 Stat. 1031 (1960),
1 D.C. Code §1410 (1961 ed.)

4. (i). No carrier shall abandon any route specified in a certificate issued to such carrier under this section, unless such carrier is authorized to do so by an order issued by the Commission. The Commission shall issue such order, if upon application by such carrier, and after notice and opportunity for hearing, it finds that the abandonment of such route is consistent with the public interest. The Commission, by regulations or otherwise, may authorize such temporary suspensions of routes as may be consistent with the public interest. The fact that a carrier is operating a route or furnishing a service at a loss shall not, of itself, determine the question of whether abandonment of the route or service over the route is consistent with the public interest as long as the carrier earns a reasonable return.

* * *

6. (a) (1). The Commission, upon complaint or upon its own initiative, may suspend any fare, regulation, or practice shown in a tariff filed with it under Section 5 (except a tariff to which Section 5 (b) applies), at any time before such fare, regulation, or practice would otherwise take effect. Such suspension shall be accomplished by filing with the tariff, and delivering to the carrier or carriers affected thereby, a notification in writing of such suspension. In determining whether any proposed change shall be suspended, the Commission shall give consideration to, among other things, the financial condition of the carrier, its revenue requirements, and whether the carrier is being operated economically and efficiently. The period of suspension shall terminate ninety (90) days after the date on which the fare, regulation, or practice involved would otherwise go into effect, unless the Commission extends such period as provided in paragraph (2).

* * *

(3) In the exercise of its power to prescribe just and reasonable fares and regulations and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

(4) It is hereby declared as a matter of legislative policy that in order to assure the Washington Metropolitan District of an adequate transportation system operating as private enterprises the carriers therein, in accordance with standards and rules prescribed by the Commission, should be afforded the opportunity of earning such return as to make the carriers attractive investments to private investors. As an incident thereto, the opportunity to earn a return of at least 6-1/2 per centum net after all taxes properly chargeable to transportation operations, including but not limited to income taxes, on gross operating revenues, shall not be considered unreasonable.

* * *

17. (a) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for the fourth circuit, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty (60) days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

CERTIFICATE OF SERVICE

A copy of the foregoing Brief has been served by mail upon Russell W. Cunningham, Esquire, General Counsel, Washington Metropolitan Area Transit Commission, 1815 North Fort Myer Drive, Arlington, Virginia, and upon Landon Gerald Dowdey, Esquire, Attorney for Petitioners, 1629 K Street, N.W., Washington, D. C., this 20th day of December, 1967.

A copy of the foregoing Brief has been placed in the hands of the printer. Printed copies of the foregoing Brief, with no substantive changes, will be filed with the Court and served upon the aforementioned counsel within 10 days.

Harvey M. Spear

BRIEF FOR RESPONDENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,988

THOMAS E. PAYNE, et al,

Petitioner,

v.

WASHINGTON METROPOLITAN
AREA TRANSIT COMMISSION,

Respondent,

and

D. C. TRANSIT SYSTEM, INC.,

Intervenor.

PETITION TO REVIEW ORDERS OF THE
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

RUSSELL W. CUNNINGHAM
General Counsel
Washington Metropolitan
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QUESTIONS PRESENTED

1. Does the failure of Petitioner to take exception to the Commission's rate of return determination preclude it from judicial review?
2. Question No. 1 notwithstanding, is the return authorized fair and reasonable and supported by substantial evidence?
3. Is the rate structure prescribed consistent with applicable law, and neither unduly preferential nor unduly discriminatory?

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BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF CASE

D. C. Transit System, Inc., ("Transit"), filed on October 17, 1966, certain tariffs, accompanied by the requisite application, including prepared testimony and exhibits of all prospective witnesses, stating proposed increases and decreases in fares for the transportation of passengers between points in the Metropolitan District, pursuant to Section 5 of the Washington Metropolitan Area Transit Regulation Compact [74 Stat. 1031, 1 D. C. Code § 1410 (1961)].

By order, the Commission suspended the tariffs until February 13, 1967, pending investigation and hearing.

After seven formal and two informal hearing sessions, during which was adduced the testimony of seven expert witnesses and 33 public witnesses, the transcript of record, comprising 1,216 pages and 79 exhibits, was closed and the matter submitted for decision.

Five weeks later, the Commission issued its Order No. 656 -- an interim order. On studying the record, the Commission concluded that certain facts were clear beyond question. Thus, the Commission found that under its existing fare structures, D. C. Transit would have a net operating loss in 1967 of $726,033. In addition, the Company would

have no revenues to cover interest expense which, in 1967, would come to more than $1,000,000. Thus, the Commission concluded, and found, that under its existing fare structure, the Company in 1967 would lose almost $2,000,000, or about $5,000 per day. No question as to these facts has been raised at any point since the Commission issued Order No. 656.

The Commission then turned to the subject of the return i.e., the amount over and above expenses and interest, to be allowed the Company. The Commission reviewed the opinions of this Court setting forth the guidelines to be followed in determining the rate of return question and considered, in detail, the evidence of record on this subject. The Company had presented a witness who testified at length on rate of return and staff witnesses had commented on the subject in their testimony. The Commission concluded that it was not satisfied with the evidence presented to it and determined to seek further assistance on the subject. Specifically, it was decided that the staff should engage a witness qualified to give the Commission further evidence as to how much profit the Company should be allowed to make.

It was apparent that substantial time would be needed -- time for the witness to prepare, time for the Company and

other parties to prepare cross-examination, and time for the Commission to consider the testimony. The Commission was therefore faced with the question as to what to do during the period in which it considered the return question. It was clear and, in fact, undisputed, that the Company was losing substantial sums each day that passed. Some increase was needed, if only to cover expenses. On the other hand, the Commission did not want to make a decision on the return, or profit, to be allowed until it was fully satisfied with the record on that point.

The Commission therefore decided to take an approach which seemed fair to all concerned. Order No. 656 raised fares only enough to cover operating expenses and interest, while requiring that further hearings be held on rate of return.

The petitioners asked this Court for a stay of Order No. 656, which was granted by an order entered on January 27, 1967.

Only one of the petitioners was a party to the Commission proceeding. His participation was limited to an oral statement made at an evening session for members of the public, and the attorney for petitioner had not been involved in the

proceeding at all until the petition for reconsideration was filed.

The Commission, on February 1, 1967, issued Order No. 667. This order reinstated the procedural provisions of Order No. 656 -- interim fare increase order -- and reopened the hearings and further suspended Transit's proposed fare schedule until March 15, 1967. The initial hearings were then held on the 13th, 14th, and 15th of February, 1967. Dr. Merrill J. Roberts, an independent expert called by the staff, gave testimony; Transit's expert witnesses gave rebuttal testimony. Subsequently, on March 13, 1967, the Commission issued Order No. 684 establishing a new schedule of fares for Transit. This present schedule -- set forth at pages 44-46 of Order No. 684 -- according to the Commission would produce net operating income of $1,903,768 in the future annual period, representing a rate of return of 5.24% on gross operating revenues. (Order No. 684, page 24)

On April 12, 1967, the Commission, by Order No. 691, denied petitioners' application for reconsideration of Order No. 684. Petitioners now bring case No. 20,988 on appeal from Orders Nos. 684 and 691.

SUMMARY OF ARGUMENT

The Commission will show that the rate of return provided (5.24%) was fair and reasonable to Transit and the riding public and that the rate structure is just and reasonable -- hence, non-discriminatory.

A. Rate of Return

The rate of return provided in Order No. 684 would yield a net operating income of $1,903,768. Such return was determined to be fair and reasonable. In reaching its conclusions the Commission considered not only the needs of applicant but those of the riding public, too. As will be shown herein -- as a casual reading of Orders Nos. 684 and 656 shows -- the Commission engaged in a thoughtful and detailed analysis. On the other hand, to substantiate their allegations, the petitioners have presented nothing. Rather, they have attempted to supplement and support their case, almost entirely, by attaching certain data to post decision pleadings. In addition, petitioners failed to raise their issue in their application for reconsideration as required by Section 16 of the Compact which provides that no party shall rely on any issue not so raised. An effort to litigate this issue now is in violation of the Compact. If allowed, it will result in an usurpation of the Commission's functions and permit the petitioners to appeal without exhausting their administrative remedies.

B. Rate Structure

Order No. 684, in a careful and detailed approach, established a rate structure which the Commission deemed reasonable and just. The Compact clearly indicates that (a) transportation problems should be approached on an area wide basis and (b) that a just and reasonable fare structure does not mean that each operation should be self supporting. The facts and data, presented by petitioners, are in error and the result of a few fundamental misunderstandings on their behalf. The route-by-route cost-analysis approach advocated by petitioners is unjustified both legally and practically. Although cost approaches have been used with limited success in certain industries, such analyses are unworkable, on a line-by-line basis, in the transit business due to the extreme difficulty of allocating joint costs, the daily variation of the number of vehicles on a line, and the elasticity of usage.

ARGUMENT

I

THE RETURN AUTHORIZED BY THE COMMISSION IS FAIR AND REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE; AT ANY RATE, THE ISSUE OF A FARE RETURN IS NOT IN QUESTION IN THIS LITIGATION.

A. <u>The Specified Rate of Return is Fair and in Compliance With All Applicable Law</u>.

The Commission found that a return on gross operating revenues at 5.24% would produce net operating income of $1,903,768. The Commission concluded that such a return and income were fair and reasonable (Order No. 684, pages 23, 25, and 26). These findings and conclusions were the result of an exhaustive, rational and prayerful study and analysis of the testimony and exhibits adduced at extensive hearings presided over by the Commissioners themselves. Thus, in addition to having the printed record, they were in a position to note and judge the actual performance and demeanor of the witnesses, and make inquiry of the witnesses while they testified, which permitted the Commission to make a more meaningful assessment of the evidence. Orders 656 and 684 contain a detailed presentation of the rate of return testimony and exhibits offered to the Commission by the applicant's witness and by the staff's witness. Little is to be gained by a restatement of the extensive analysis of this matter by the Commission. This is done in the orders and is clear and unambiguous.

The return allowance provides sufficient money to assure that all of the enterprise's legitimate expenses will be met, and that enables it to cover interest on its debt, pay dividends

sufficient to continue to attract investors and retain the sufficient surplus to finance down payments on new equipment and generally to provide both the form and substance of financial strength and stability, thereby complying with the standard prescribed in D. C. Transit System, Inc. v. Washington Metropolitan Area TransitCommission, 350 F 2d 753 (D.C. Cir., 1965). At the same time, the Commission successfully set this return at the lowest possible level consistent with all pertinent and constructive objectives The Commission was both mindful of the public need and of the company's financial health as it related directly to the standards of service which the public demands of it. The Commission sought such a solution consistent with the objective of retaining a high standard of service for this community. It was cognizant, and Orders 656 and 684 clearly indicate this, of the financial needs of the populus of this area as well as the financial needs of the applicant. (Order No. 684, p. 34) The Commission employed a variety of cross-checks to determine the validity of its conclusions. (Order 684, pp. 27-30) These checks ircluded the return on system rate base and a comparison of Transit with other selected transit companies as to return on total capitalization, common stock equity, net plant and gross operating revenues. (Order 684, pp. 29-30) These

comparisons "confirm the fact that the net operating income at which we have arrived falls firmly within the range of reasonableness based upon our judgment and the testimony of experts." (Order 684, p. 29)

Orders of an administrative agency may not be upset if they are within the scope of the agency's statutory law and are based upon adequate findings which in turn are supported by substantive evidence. U. S. v. Pierce Auto, 327 U.S. 515. Orders Nos. 656 and 684 clearly, overtly, and unambiguously set forth in lucid detail all of the Commission's findings. It is clear from the most casual perusal of the evidence of record that Order 684 is supported by sufficient evidence. Under such circumstances the Court should not substitute its judgment for that of the Commission.

B. Petitioners Have Failed to Meet Their Burden of Proof.

All allegations set out in pages 6 through 11 of petitioners "brief" were given thoughtful consideration by the Commission, and are discussed in detail in Orders Nos. 656 and 684. (See especially Order No. 684, pages 21 through 34) Specific remarks of petitioners, scattered throughout their brief, fairly raise the inference that they have not bothered to read these orders or else fail to grasp the plain meaning of their language. Reference to these orders negates petitioner's claims; hence, by and large, no other reply is necessitated.

Petitioners have, as noted previously, attempted to supplement the record by affixing various data to post-decision pleadings. So too, petitioners cite very few facts, if any at all, to support their allegations.

However, a few matters require comment. Much of the material presented on pages 6 and 7 of petitioners brief refers to previous dividends and/or the past financial history of Transit. By and large, this discussion is irrelevant. Transit must be dealt with, at this time, according to the prevailing situation of the current market. To do <u>otherwise</u> would seriously endanger the company financially and threaten its level of service: In the financial market place, past laurels account for little. At any rate, it is fair to point out that Transit has not paid dividends lately -- in fact, no dividend has been declared since July of 1966.

The Commission has, in past fare cases, spoken on the past earnings of the company. See Orders 563, issued January 26, 1966, and 564, issued January 26, 1966; moreover, while Order 564 projected a return on operating revenue in 1966 of 6.03%, the company actually earned 4.43% (Order No. 684, p. 33; J.A.___).

Turning to page 8, petitioners set forth a few remarks concerning depreciation. This discussion is indicative of petitioners misunderstanding of not only the instant record

but the total spectrum of utility regulation. Depreciation is an operating expense and is not related to a fair return. The petitioners contend that the Commission (Order No. 362) reduced the depreciable life of buses from 14 to 12 years, and that its main reason was to encourage Transit to acquire new buses. Petitioners have misread Order No. 362. There, as in most cases, the Commission relied on the classical concept of depreciation.[1/] The Commission ordered the 12-year depreciation schedule based solely on the life of the property concerned; concomitantly, it ordered Transit to replace 1/12th of its fleet annually. Petitioners follow up this assertion with two questions. . .namely, one, how much of the depreciation allowance represents a return on investments and, two, how much of the deduction for depreciation is in fact profit on operations. Obviously, the answer to both of these is none.

Petitioners contend the same type of inquiry is required to all other reserved accounts. They say that to the extent of such deductions are overstated, they result in a phantom profit. Likewise, this allegation is not supported by the slightest fact. Secondly, petitioners assert that the underapplication of acquisition adjustment account results in an increase in hidden profits, and that the Commission has made

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[1/] See Order No. 245, served April 12, 1963, at pp. 18-21, 32-34 See also Lindheimer v. Ill. Bell Telep. Co., 292 U.S.151, 54 S. Ct. 658.

no meaningful inquiry into these distinctions. This, however, is simply not the case. See page 12 of Order 656.

Lastly, the only other item remaining in this section of petitioners' brief warranting comment is the applicant's efficiency or lack of it. First of all, petitioners allege that the Commission has offered no rationale for the reasonableness of expense allowances; secondly, petitioners contend that the alleged inefficiency of Transit appears to eminate to some extent from the high amount of overtime labor pay. Then, to quote petitioners, they say: "Why is this? The record offers no answer."[3] The public has a right to know the answers and the Commission has shuned its responsibility, say the petitioners.

Seriously, petitioners' attorney appeared in this proceeding representing a formal party. Petitioners' counsel could have opened any line of inquiry not opened as well as he could have explored more fully the subject already open. For an attorney to sit idly by, neglect to examine and investigate pertinent fields of inquiry, and then on appeal to demand to know why these lines of inquiry were not explored by other parties is puzzling, at best. Not only did petitioners sit idly by, but such statements as these lead to the inescapable conclusion that

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[3] See infra, p. 13.

they have subsequently sat idly by and have prepared their brief on appeal without giving the slightest attention to the evidence of record. For instance, with regard to the expense allowance, a simple reference to page 6 of Order 656 immediately dispells any question upon this issue. More to the point, the Commission said that for the purpose of Order 656, the Commission would accept as an expense item the full amount stated in the staff's pertinent memorandum. This was a known cost for the future annual period as the record then existed. The Commission said that this matter may be subjected to examination in the hearing hereinafter scheduled. Needless to say, petitioners did not even examine on this. (See also Order 684, p. 33). And then, in reference to the subject of overtime pay, it can be first pointed out that it is a matter of common knowledge that in many instances, it is simply more economical to operate on some degree of overtime pay than it is to bring men in for a straight pay schedule.[1] It must be remembered that with the present labor shortage, it is even difficult to obtain a full quota of drivers. The evidence of record amply indicates that Transit was doing everything in its power to achieve an appropriate and sufficient balance in this respect.

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[1] Tr.440-72.

Next to that, mere reference to pages 7-9 of Order 655 reveals that this matter was considered in detail. Petitioners' contentions lead to one conclusion, i.e., it is quite questionable if the petitioners ever read the record.

The most incredible contention is the mathematical exercise relating to assignment of buses at pages 13-14 of their brief. While a clear clarification of this subject was given in Order 691, the petitioners fail to even disclose the existence of such clarification. See II, C, infra.

As indicated, very little of petitioners material (Brief, Part I) is part of the record in this proceeding, legally or factually correct, relevant or material. What is more, petitioners' allegations are unsupported by any cited facts and it seems inescapable that they have failed to meet their burden.

C. The Fair Rate of Return Is Not An Issue In This Case

As seen from the evidence of record, petitioners' application for reconsideration took no exception to the Commission's determination of the fair return to be allowed.

1. Now, movants not only come forward questioning the fair return, but attempt to supplement the record by quoting frequently from and referring to, amongst other things, a document which is not part of the record in this case. One cannot, under any circumstances, supplement a record by affixing extraneous matter to post-decision pleadings.

2. More to the point, Section 16 of the Compact provides that the petitioners shall assert no ground not relied upon in its petition for reconsideration.

> "Any person affected by any final order or decision of the Commission may within 30 days after the publication thereof file with the Commission an application in writing requesting a reconsideration of the matters involved and stating specifically the errors claimed as grounds for such reconsideration. No person shall in any court urge or rely upon any ground not so set forth in any application. . .***"

Initially, the Court must make inquiry as to its jurisdiction. The arguments raised herein under the subject of fair return -- as shown by Section 16 set out above -- are not within the Court's jurisdiction in this situation. As said, petitioners failed to raise these in their application for reconsideration. Hence, the Court should disregard pages 6 to 11 of petitioners' brief, on this basis alone.

3. Not only should the court disregard the arguments made in petitioners' section entitled "Fair Return" due to the fact that petitioners have violated Section 16 of the Compact but because the substantive reasons underlying that section are cogent in themselves. If the Court deals with petitioners' argument, it will ursurp the Commission's functions and negate the judicial policy of requiring a litigant to exhaust his administrative remedies prior to appeal. "A reviewing court usurps the agency function when it sets aside the administrative

determination upon a ground not theretofor claimed and deprives the Commission of an opportunity to consider the matter, make its ruling and state the reasons for its ruling." Unemployment Commission of Territory of Alaska v. Aragon.[4] Also in Federal Power Commission v. Colorado Interstate Gas Company[5] the Supreme Court held that an appellate court could not consider a subject which had not been urged before the FPC in an application for rehearing. Therein the Court stated:

> "Section 19 reflects the policy that a party must exhaust its administrative remedy before seeking judicial review. To allow the Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirement of Section 19 that objections must first come before the Commission."

In Myers v. Bethlehem, 303 U. S. 41, 58 S. Ct. 459 (1938), the Court stated:

> ". . .the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . ."

Hence, the Commission respectfully requests the Court to disregard and dismiss from reconsideration Section 1, pages 6 through 11, of petitioners' brief as being irrelevant and not in issue in this litigation -- Section 16 of the Compact. So too, to consider this material would result in a usurpation of the Commission's functions and allow petitioners to appeal without exhausting their administrative remedies.

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[4] 329 U. S. 143 67 S. Ct. 245

[5] 75 S. Ct. 467

II

THE RATE STRUCTURE SET FORTH IN 684 IS CONSISTENT WITH THE APPLICABLE LAW AND IS NOT UNDULY PREFERENTIAL OR UNDULY DISCRIMINATORY

Petitioners contend that the rate structure is unduly discriminatory against the riders in certain sections of the District of Columbia and that the following corrective measure should be taken: namely, that various routes operated by Transit should be broken down on a cost-analysis basis and fares set accordingly.

Roughly, it is contended that the downtown or "mid-city" operations subsidize the suburban or "outer city" operations. In an attempt to justify these assertions, petitioners rely heavily, if not almost entirely, on what they claim to be an uneven and disproportionate allocation of buses assigned between so called Maryland and D. C. "fleets". In addition, petitioners erroneously utilize Exhibit S-11, prepared by the Commission's Chief Accountant.

A. The Existing Fare Structure Is Fair, Reasonable, Just And Consistent With The Regulatory Scheme Promulgated By The Compact.

The Commission through a detailed analysis (documented to substantial evidence) indicated, without doubt, that the rate structure was just and reasonable. (Order 684, pp. 34-35) All of the material advanced by petitioners was adequately considered by the Commission in Orders Nos. 684 (pp.38-45) and 691.

The Washington Metropolitan Area Transit Regulation Compact contemplates the development of an adequate and efficient transit system on an economic area-wide basis without regard to arbitrary jurisdictional boundaries. The purpose of this Commission is to get away from or put an end to the frustration and bickering which hampered the three jurisdictions prior to the Commission's creation. Petitioners would have us return to that situation, and even more so. For one thing, as pointed out in Order 684 (pages 41-42), petitioners' approach would likely stifle the growth of mass transportation in the suburbs and frustrate the overall development of the mass transit system. Ironically enough, the suburban growth pattern allowed the Commission to establish a lower rate of return than would have otherwise been the case. (See Order 684, pp. 14, 34) Moreover, the Compact -- by the way, its very existence indicates that transit problems are to be coped with by an area-wide approach -- makes it clear that petitioners' approach is unacceptable.

Section 4(i) of Article XII states:

> "The fact that a carrier is operating a route or furnishing a service at a loss shall not, of itself, determine the question of whether abandonment of the route or service over the route is consistent with the public interest as long as the carrier earns a reasonable return."

It is clear that the Compact does not contemplate a transit system in which all operations would be self-supporting. All in all, Order 684 clearly reveals that the authorized fare structure fairly distributes the burden of producing revenues while promoting the use of mass transportation.

At any rate, both at common law and under contemporary regulatory statutes, the discrimination which is forbidden is an unreasonable differentiation without factual justification. In such a situation, there must be a clear showing of an advantage to one group with a resulting injury to another. Carpenter v. PUC, 36 PUR (N.S.) 111 (1940). What has been said is obviously ample to justify the prescribed structure.

B. Cost Analyses Approaches Are Impractical and Unworkable

The formulation of a totally adequate and reasonable rate structure is a difficult task. It is not an exact science, unfortunately. Apparently, petitioners are laboring under the erroneous idea that there exist a road from a cost analyses to the ideal rate structure. This is not the case. Traditionally, route-by-route cost approaches have created more problems than solutions, and as a result are rarely presented as evidence in transportation rate cases.

Cost analysis concerns itself solely with the supply side of the market. Any cost analysis would unavoidably and inevitably require the difficult problem of allocating to each segment a share of the cost that are incurred in the production of the entire system. Only a small part of the total costs can be separated or identified with the individual segments. By far, the more sizable portion of total costs [1] is not identifiable with any specific service, customer service, or segment thereof. All in all, costs are incapable of accurate allocation between specific operations. Such an attempt evolves arbitrary guesswork. In this field there is no such thing as a scientific study. While cost approaches have found some success in the electric or telephone industries, or for that matter railroad services, this is certainly not the case in the transit industry. (See Order No. 681, p. 44)

Of significant importance in the establishment of a reasonable rate structure is the value of the service, that is, the demand side of the market. In this connection, costs are generally somewhat distributed to various segments according to the elasticity associated with each intrical part. Specifically, the application of petitioners' cost approach when confronted by the elasticity existing in pro-

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[1] One sizable portion of such operating costs is depreciation, which occurs even when the vehicle is not in use.

portion to extension of Transit's service would inevitably stifle the growing transit operations in the suburban areas and result in the complete deterioration of the area wide transit system. (See Order No. 684, pp. 41, 42)

Petitioners' theory of setting fares by routes was rejected by all of the expert witnesses quizzed on this subject. In fact, there is not one shred of <u>evidence</u> in the record to add an iota of credibility to the theory. Petitioners were unable to produce a witness to even advocate such a theory.

C. <u>Petitioners Have Failed to Meet Their Burden of Proving That The Prescribed Rate Structure Is Unjust and Unreasonable</u>.

Petitioners have attempted to substantiate their allegations in two ways, mainly. First, certain figures relied upon are evidently taken or computed from Exhibit S-11. This exhibit was based upon the methodology required by Public Law 87-507 and was used solely to determine Transit's eligibility for the school fare subsidy. Its use otherwise would be inappropriate and Order 684 at pages 42-44 clearly points this out.

The Chief Accountant of the Commission, Mr. Lewis, offered Exhibit S-11. The pertinent portion of his testimony-in-chief (Tr. 773) is reproduced in Order 684, at page 43. His comments on cross-examination, reveal the distorted use petitioners have

made of the exhibit, describe the judgmental factors required to even consider the various different systems available for allocation of various costs, and disclose his opinion that the profitability of a particular line cannot be determined in a practical manner. (Tr. 936-942) Secondly, petitioners charge that Transit operates a Maryland fleet and a D. C. fleet and that the allocation of buses both in numbers (455 to Maryland) and quality is disproportionate. From this, numerous figures are produced to show purported outrageous inequities.

Petitioners completely misunderstand the situation. The 455 buses claimed to be operated in the Maryland fleet are in no manner operated exclusively, as petitioners contend, in Maryland. Rather this is only the number of Transit's buses licensed to go into Maryland if need be. On the other hand, every bus of Transit is licensed to and does operate in the District of Columbia. The record clearly shows that many of these vehicles serve primarily the District of Columbia and go into Maryland in an incidental manner only. Other vehicles while licensed to go into Maryland, if needed, are seldom used in Maryland. Consequently, about all the figures set forth in the second part of petitioners' brief which are formulated from this assumption are completely erroneous. Petitioners, for instance, on page 12 discuss the depreciation

in relation to the Maryland-D. C. fleets. There is no basis for this allocation, because a bus licensed to operate into Maryland may not even operate outside the District of Columbia or may operate 90% of its mileage in the District of Columbia. In this connection, at page 2 of Order 691, the Commission, in denying petitioners' application for reconsideration, said the following:

> The arguments made are replete with error and misreading of the record. For instance, it is claimed and expatiated upon at length, in an attempt to show discrimination against District of Columbia riders, that 455 buses serve the Maryland area. In fact, the record shows that this is the number of actual vehicles licensed to drive into Maryland, but many, many of these vehicles serve primarily in the District of Columbia and only go into Maryland as a minor incident to that service. Others, while licensed to go into Maryland if needed, are not used there on a given day.

Consequently, the court is confronted with the inescapable conclusion that petitioners have totally failed to meet their burden to present credible evidence supporting their allegations. Not only have they presented erroneous data, characterized by fallacious assumptions, but they have attempted boot-strap supplementation of the record, by attaching non-record documents to post-decision pleadings.

Despite the fact that the Commission spelled out the details of the utilization of the buses in Order 691, the basic facts are drastically distorted by petitioners in their brief. In fact, Order 691 is never mentioned.

Lastly, petitioners have failed to put the situation in a proper perspective. Transit's operations are seemingly split between those in Maryland and those in the District of Columbia with the result being that the poor of the inner city are being discriminated against. First, any cost analyses, in all fairness, would result in a total break-down. Day-night, off-on peak trips should be figured, in other words. Second, there are many classes of groups of people who live in the inner city other than the poor -- dowagers, dandies, and the affluent, for instance. Third, it must be pointed out that the suburban bus rider is often the forgotten man in rate cases. The suburban rider, for example, will ride the bus in the downtown area and in the suburban area. Thus, he is often subjected to two increases. This point further illustrates the fiction of dealing with the areas problem from a fractional approach, with nebulously defined groups, rather than treating it as one economic unit. And fourth, assuming that petitioners' theories could be used to develop an adequate rate structure, it is still doubtful that it would ever be workable. Numberous problems would arise. For instance, would there be a refund or an additional charge in the case of transfer from one line to another at a different fare?

In prescribing the fare structure authorized Transit in Order 684, the Commission discussed the class of fares it was establishing: Capitol Hill Express (p. 36); Maryland intra and interstate fares, by zone (p. 36); token (p. 37); interline and cash (p. 37). It dissected the effect of each fare, calculated the number of one-way rides for such fare, after considering the passenger resistance, and the resulting revenue (Order 684, p. 37; J.A.)

It set forth explicitly the facts and its reasoning for maintaining the cash fare at .25¢, while raising the price of a token ride from .215¢ to .245¢.

While petitioners allege a discriminatory fare structure, the Commission was establishing a basic 25¢ cash fare for intra-Maryland riders[7/] -- the same as for riders in the District of Columbia.

While petitioners allege a discriminatory fare increase for the District of Columbia rider in comparison to the Maryland suburban rider, of the additional revenue to be provided, 22% comes from the adjusted Maryland interstate fares -- which normally produces 14% of the Company's regular route revenues (Order 684, p. 40).

7/ Fares must not be "unduly" discriminatory "between riders or between sections"of the Metropolitan area. Sec. 6(a)(2), Compact.

The Commission detailed the facts which led it to reject petitioners' theory of a different fare for each route (Order 684, pp. 40-45). Not only is their approach legally prohibited (for obviously they are advocating an unduly discriminatory fare between riders even within the District of Columbia), but as pointed out in the order, as a practical matter it would cause chaos among the passengers and severly disrupt the operation of the system.

Other administrative agencies have rejected the establishment of a fare structure constructed directly from costs. Re Arkron, C. & F.R. Co. v. Atchison, T. & S. F., 321 ICC 17; 322 ICC 491 (1963). While that case dealt with divisional scales among railroads, in an opinion affirming the Interstate Commerce Commission's orders, the Supreme Court said:

> It is also true that the changes produced by the new scale were not the same for every existing division. Some. . .were increased more than others, and a few were actually reduced. But that is only to be expected when a uniform scale is [adopted]. . ."[6]

So also, it is to be expected in the multiple fare zone of Transit, when the Commission adjusted a 12 tiered structure. It should be noted that mainly the new fares as in multiples of 5¢, rather than the existing 72 differential; the result

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[6] Chicago & N. W. R. Co. v. Atchison, T. & S. F. R. Co. 387 U. S. 326, 87 S. Ct. 1585 (1967).

is a more uniform structure, more readily learned by the passengers and collected by the drivers.

As said, the Commission's reasoning and conclusions are discussed at length in the orders. Little is to be gained by a re-statement of even the extensive analysis of this matter. This is done in the orders, and it is clear and unambiguous. Orders of an administrative agency may not be upset if they are within the scope of the agency's statutory law and are based upon adequate findings, which in turn are supported by substantial evidence. United States v. Pierce Auto, cited supra.

CONCLUSION

Petitioners have failed to set forth any material showing of a) any error in the prescribed rate of return or b) any unjustified differentiation in fares. They have not met and discharged their burden, and to the extent that they have attempted to support their allegations, almost all of their data is irrelevant, erroneous, or not in the record. On the other hand, Orders 656 and 684, carefully documented to the evidence of record, speak for themselves.

Actually, as pointed out, the question of a fair rate of return is not properly in issue herein, and petitioners' attempt to raise it violates Section 16 of the Compact.

The entire cost-analyses concept presented by petitioners is contrary to the spirit, intent and language of the Compact which created this Commission. This Commission was created so that mass transportation could be dealt with on an area-wide, system-wide basis. The purpose of this Commission is to overcome the narrow interest of particular areas and establish rates and services which will promote the best possible transportation scheme on an area-wide basis. Certainly, the entire coordinated system of a city's transportation scheme must be considered as a unit. Moreover, petitioners have failed to disclose that any preference or discrimination exists in the fare structure, let alone that a fare is "unduly" so.

Wherefore, the respondent respectfully submits that the petition for review should be denied and the orders affirmed.

Respectfully submitted,

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Dated: December 20, 1967